IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

LOWERY	§	CASE NO. 4:22-cv-3091
	§	HOUSTON, TX
VERSUS	§	WEDNESDAY,
	§	MAY 31, 2023
TEXAS A&M UNIVERSITY	§	10:50 AM TO 11:51 AM

MOTION HEARING

BEFORE THE HONORABLE CHARLES ESKRIDGE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PARTIES:	SEE NEXT PAGE
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HOUSTON, TEXAS; WEDNESDAY, MAY 31, 2023; 10:50 AM

DEPUTY: All rise. The United States District Court for the Southern District of Texas is now in session. The Honorable Charles Eskridge presiding. God save these United States and this honorable court.

THE COURT: Thank you, everyone. Please be seated. All right, I call Case Number 22-3091, Richard Lowry versus Texas University System and others. Can I get appearance of counsel, please?

MR. MITCHELL: Good morning, Your Honor, Jonathan Mitchell, for the plaintiff.

THE COURT: Welcome, Mr. Mitchell. And for the for the defendants.

MR. KRUSE: Good morning, Your Honor. Layne Kruse for the defendants.

THE COURT: Thank you.

MR. KRUSE: Well, and Carter Crow.

THE COURT: I was going to say we can't short change Mr. Crow either. Welcome to you both. It's good to see you. And who do you have a table with you?

MR. TRAHAN: Paul Trahan and Ryan Melzer also with Norton Rose Fulbright, representing the defendants, Your Honor.

THE COURT: All right, great. Thank you all. All right. Well, we're loaded for bear with good counsel on both sides. Let me ask first, for purposes of this hearing, I'm

more interested -- just so you know -- in the standing and ripeness issues on the 12(b)(6) claims we've got pending at the Supreme Court, Students For Fair Admissions versus President and Fellows of Harvard College. I think that whatever the court has to say there is at least going to be informative on what I would think about the 12(b)(6) issues going forward. Is there anything anybody would like to address on that or disabuse me of the idea that somehow what the Supreme Court is about to say on that case could matter here? Any disagreement with that?

MR. MITCHELL: No, Your Honor. We don't disagree. I think there likely will be relevant discussion.

THE COURT: Okay.

MR. KRUSE: I don't think that that's going to directly impact the arguments on 12(b)(6) as well as our arguments on standing, but I understand the Court's focus on standing because we do think that's the most important issue that the Court should think about today, as well as ripeness.

THE COURT: Okay.

MR. KRUSE: But I think we can certainly defer, you know, to our 12(b)(6) arguments that are in the brief.

THE COURT: Because I look at it that I've got these threshold issues to deal with first. And to the extent I would get then to the issues in the motion to dismiss on 12(b)(6), I probably would do to have some additional briefing on that at

the time. It just seems to make sense. I had a case -- well, I still have pending a case from last term when Dobbs was pending. It was an action before me brought by the Satanic Temple on abortion restrictions here, which I held off until Dobbs came down. And that clarified a lot of the issues of going forward there. So I just think that that has the potential here as well.

All right. So let's start with standing. I'm going to have most questions for Mr. Mitchell. I've got the point of your argument. I'm going to let you all start with what you want to emphasize for me there. And it'll probably, as we go through it, give Mr. Mitchell a heads up of questions that I'm going to have for him. But Mr. Kruse, always happy to hear you argue on summary judgment or motion to dismiss. Go ahead.

MR. KRUSE: Your Honor. I'm prepared to argue a motion to dismiss on standing and ripeness here. And as this Court is well aware, this is a what we call a hypothetical employment discrimination case for injunctive relief brought by, you know, Professor Lowery, who is a tenured professor at the University of Texas who says he wants to teach at A&M. His brief says the Finance Department in the College of Business.

Now as a preliminary matter on standing, this Court we should be well aware that Professor Lowery has not applied to work at Texas A&M. He's never applied to work at A&M as far as I know. And his only excuse is that he fears that Texas A&M

will discriminate against white men and Asian men. And that's why he fears for not, you know, for not applying. But he is also -- what I think is important to realize -- he's never identified -- it's not in his complaint -- he's never identified anybody else, any white male or Asian male who is discriminated against by Texas A&M.

He's also claiming that he wants to move to College Station. But as we know, he also has this other lawsuit where he's telling another federal judge in Austin that don't fire me at UT because I'm an outspoken critic of diversity initiatives, don't fire me, don't cut my pay. So he has that lawsuit going on in Austin right now where he is telling this other federal judge that basically he wants to keep his job at the University of Texas. And at the same time, he's --

THE COURT: Does that, does that necessarily conflict that he wants -- he doesn't want to get fired from UT, but that would -- the fact that he might be getting fired from UT is a reason that he might want to be looking around for other employment. I'm not sure that I necessarily see those at complete loggerheads.

MR. KRUSE: Well, I think what we've, what you -- the standard on imminent, imminent harm, you know, the Supreme Court in many cases talk about -- use that phrase "imminent harm," -- actual or imminent harm at the hands of Texas A&M. I don't think that gets you there on imminent harm. And that's

why we've emphasized that as he really focused on that. I mean the Supreme Court, for example, in that Carney case, and I would really direct your attention to that. I know you've read that, but --

THE COURT: I do have questions about the Carney case. I have one other -- I didn't look at it before I got up on the bench -- I had a standing decision where I read and applied Carney. I think it was a Fair Debt Collection Practices Act, but I may be misremembering. But no, I mean, I'm familiar with the Carney case.

MR. KRUSE: Well, let me, let me emphasize two things about Carney -- and I know Mr. Mitchell says it helps him, not us -- but let me, you know, the court, of course, denied standing.

THE COURT: There is the averment of being able and ready, but that alone is not enough. It's sort of like, okay, that's like --

MR. KRUSE: That's right.

THE COURT: -- what's behind the supposition that you're able and ready that you've actually done to show that you still sustained a concrete and particularized injury. Go ahead.

THE COURT: Yes, sir. Well, let me emphasize two facts that the Supreme Court pointed out. And what is interesting in Carney, of course, is that the District Court,

the Third Circuit both said he had standing. And when he got to the Supreme Court, they just rewrote it all and said he had no standing. But what, a couple --

THE COURT: Am I remembering Carney right? It's a pretty short opinion, right? Am I remembering it correctly?

MR. KRUSE: Well, Justice Breyer wrote it and he doesn't write short opinions.

THE COURT: Justic Breyer? Okay.

MR. KRUSE: Justic Breyer wrote it and --

THE COURT: Well that would weight against it being short.

MR. KRUSE: Well, that's what I recall. But what -- they reviewed the evidence, they reviewed the facts. And so definitely it was a factual analysis of standing. But let me just highlight two of the facts here because it bears in our case. It says they highlighted the fact that he had not applied before to be a judge. That's like Professor Lowery. He's, we have no -- he's never applied to be a professor at Texas A&M. The other issue is that they point --

THE COURT: Are there any cases that say -- because I, I mean, I would assume if it was to be articulated about why I haven't applied, it would injure me if I think that I don't have a fair chance at it. And so why should I subject myself to the humiliation of an application process that's not fair? And so, and I'm sort of the view is like, do we require our

plaintiffs to be made of sterner stuff than that? Do we require them to -- it's not a cost-free process to apply but not hard to apply. And so do we -- do the cases sort that out clearly?

MR. KRUSE: Well, obviously the case has come up with the language "concrete harm" actually. So how do you get to concrete harm? And when you say is it, is it -- and, and we say, if all --

THE COURT: That's sort of my question. Is it concrete harm to say, well, I'm going to apply and get denied and that's humiliating and I don't want to subject myself to that.

MR. KRUSE: Well, let's look at the, the two cases where that comes from. Or one case where that comes from is the Teamster's case.

THE COURT: Okay.

MR. KRUSE: About 1977 US Supreme Court case on US Teamsters where -- which was actually a settlement of a Title VII case or dispute on discrimination. And one of the issues was whether or not the black truck drivers could apply for seniority retroactively when they had frankly knew that they would be discriminated against? Your Honor, I -- this case is so far removed from that situation.

THE COURT: And that's on track record where you could then say, and here's the -- not just I'm looking at

policies that suggest there might be discrimination, just looking at it as here's a record of discrimination in the past.

MR. KRUSE: Well, let me, let me --

THE COURT: That's a particular employment decision.

MR. KRUSE: And what I -- the language used, "known and consistently enforced policy of discrimination," that's the language that the Fifth Circuit used in the Shackelford case, "known and consistently enforced policy of discrimination." There is no evidence that that's what exists at Texas A&M. We've been all over that. And so to say that he can just get out of applying for a job at A&M because he says "I fear discrimination," that's the problem, Your Honor. And I don't think -- and I do think we're, we're really looking at a significant -- if you make the burden light, you know, I'm as a trial lawyer --

THE COURT: In standing you mean?

MR. KRUSE: I'm sorry?

THE COURT: The burden as to showing standing?

MR. KRUSE: Yes. Yes.

THE COURT: All right. Go ahead.

MR. KRUSE: Lighter on the plaintiff because all he's got to say is that, well, I fear that discrimination. I think there is a practical problem about opening the door to types of lawsuits. So that is a major issue.

THE COURT: Okay.

MR. KRUSE: So I think he doesn't meet what happened in Teamsters and he doesn't meet even that language that the Fifth Circuit is used in Shackelford trying to analyze Teamsters too about known and consistently enforced policy of discrimination. So I think that's one of the major problems that he's got. But let me focus on -- and since you've read Carney, I will pick up on that language of "someday" -- we think he's a someday plaintiff. Now he may want to apply to A&M at some day.

THE COURT: Well, it's like he's a no day plaintiff. He's not even intending to.

MR. KRUSE: Someday, yeah, someday. Well you don't even have to go that far. But someday, he's going to get around to it and applying to A&M. He's working at UT. He's applied to University of Florida, and someday he may want to come to A&M. I understand that, but that doesn't get you in the door.

THE COURT: The policies in Florida, am I -- whatever DEI plan or whatever is on their web page, is it still there? Have there been statutory changes in Florida? And does that even matter because I take it that when he applied, the point is there was a DEI policy stated on its web page. I'm just wondering, sort of like, well, I was thinking that that might change, and I don't know, has it changed in Florida? Or do you even know?

MR. KRUSE: I believe the law has passed in Florida because Texas passed the law very similar over the weekend. And that's what we pointed out in our filing that we made yesterday, that Texas passed a similar law.

THE COURT: And we should be talking about that's moot at this point?

MR. KRUSE: Yes, sir. Because we raised that in our supplemental filing that we filed yesterday.

THE COURT: Oh, I haven't seen that filing.

MR. KRUSE: Well, I'm, I'm sorry.

THE COURT: Is it based on this -- a new house action or new law?

MR. KRUSE: Yes. Yes, sir.

THE COURT: What did that do?

MR. KRUSE: And I will -- may I hand you, I can hand you a copy of that that I have an extra copy of that.

THE COURT: Sure. Mr. Mitchell, you've seen it and I take it that --

MR. KRUSE: It's Housefield --

THE COURT: You won't be tied and flatfooted. You'll always be able to respond to it in writing. Don't worry.

MR. MITCHELL: We, we did file a written response about this. I'm sorry. Go ahead.

THE COURT: And do you have a copy or my case manager can print one for me?

MR. MITCHELL: We filed it about three hours ago.
THE COURT: Okay.
MR. MITCHELL: I'm sorry. I was so close to the hearing. They filed yesterday, so.
THE COURT: Well, this one was filed yesterday. So I think that that's okay.
MR. KRUSE: Here. Do you have a copy?
MR. MITCHELL: I have a copy.
MR. KRUSE: Okay.
MR. MITCHELL: And, counsel, we did file a response. I don't know if you saw that.
MR. KRUSE: I've got that response too.
MR. MITCHELL: Okay. It was, yeah.
MR. KRUSE: I appreciate that.
THE COURT: If you'll just print that for me when you can. Thank you, Mr. Mitchell.
MR. KRUSE: Well, let me --
THE COURT: Just briefly, what was it? And have you all had a chance to confer as to whether this really does start to address the concerns that Mr. Mitchell's client is at least raising whether as a concrete matter or whether as a matter of policy?
MR. KRUSE: Well, Mr. Mitchell has filed his response. He says it does not.
THE COURT: Okay.

MR. KRUSE: So it is what it is. But since the Court asked, let me just spend a couple of minutes on that. But Senate Bill 17 was passed on Sunday. And we expect the governor to sign the bill. It's listed already as one of his major achievements, you know, for the legislative session. He signed the bill and what we have pointed out in our supplemental authority, two arguments here. Because in this supplemental authority, Your Honor, or in the bill, what it does, it prohibits, you know, state public universities from having diversity offices, from having, you know, diversity statements required of applicants. It prohibits preferences on race or gender. Those are all the issues that I believe had been raised by Professor Lowery when he was saying that's what Florida was on the way to doing with their legislation.

So Texas now has either copied Florida or gotten ahead of Florida on its legislation. But this is what is in effect. And we think it has two very strong reasons as to why this case should be dismissed. One, Your Honor --

THE COURT: As to standing or as to mootness?

MR. KRUSE: Standing and mootness.

THE COURT: All right.

MR. KRUSE: We think standing goes to the fact that if you've got to show as we -- as certainly impending threat of future harm to justify his wholesale injunctive relief, which he's asking, that does not -- we can raise that right now. And

that goes to standing because not only do we have the established policies we've argued of Texas A&M, but now we've got the state law on top of it. We don't believe that there is a certainly impending -- and that's the language of the Supreme Court -- threat of future harm to the plaintiff.

We also want to point out, Judge, that it goes to ripeness. There is no hardship.

THE COURT: I do see -- I'm looking at Mr. Mitchell's response right now that standing, standing is determined as of the date of filing, which I agree with. But so what I think you're saying though is mootness.

MR. KRUSE: Well let me, let me -- and I hesitate to take issue with Mr. Mitchell here. His first point is that standing is unaffected by post-filing events. Your Honor, I agree that standing is determined on the date the lawsuit is filed. But, and if I may quote the, well, I guess the Carney opinion, Carney v. Adams, standing as of the time he brought this lawsuit and maintaining it thereafter. Standing can be -- come into play any time during the case. If you lose standing, you're out of court right.

THE COURT: Right. You hear the argument -- and you've also raised ripeness. And so, I mean, reading the cases in the briefing on that, I mean, really the ripeness argument that you're raising kind of overlaps with whatever conclusion I would reach on standing. And I sort of think as a, as a

conceptual matter, mootness is distinct. I hear what you're saying that it's like, oh, this happened and so now he no longer has standing, I would tend to let -- I'm not saying that you can't raise the argument. I'm just sort of saying I put it in the box of "I might find it to be moot."

MR. KRUSE: Well, I want to cover both boxes here, you know. I guess if -- I can argue for both areas. I do think it covers both areas.

THE COURT: You're paid to argue all the boxes.

MR. KRUSE: Well, and I do believe there's an overlap, you know, on the issues here.

THE COURT: Okay.

MR. KRUSE: You can't just put them in a separate box, but it goes to standing because he says, I mean, Mr. Mitchell says that we haven't, it doesn't go to mootness. And I understand their arguments, but what we cite in our case, what we think is the latest Fifth Circuit opinion, is that Freedom From Religion versus Abbott, and that's where they changed the rules on what could be displayed in the state capitol. They changed the rules. And then the Fifth Circuit said, well, they changed the rules and there was mootness there and we, and we're dismissing the case. What we quote in -- you know there's an argument that, oh, this is, this is a voluntary secession. What we're saying about the statute, it's a state statute. You know, of course, we believe at Texas A&M, we're

not, we're not violating any discrimination laws to begin with. But now we've got this state law on top of it that forbids the diversity offices and diversity statements.

THE COURT: Well, in terms of that, I guess I would ask this. Based on the law that has just been passed, does Texas A&M have to do a review of all its policies and make changes to what it's doing or at least potentially consider that it has to make changes?

MR. KRUSE: Well, I'm not, I think we're probably we are complying with the law, but there may be areas that we're going to have to take a closer look at because, because we're going to comply with this law.

THE COURT: Right.

MR. KRUSE: And what, what I would like to point out though in terms --

THE COURT: That's a different -- you have policies that are in place and, of course, they're internally vetted at the university. And so there's obviously a belief that what's imposed currently meets prior statutory and constitutional constraints. Now you have a state law overlay and I'm, it's a friendly question, I would just assume that the university is like, well, in light of a new law, we're really going to have to do a top-to-bottom review of our policies and make sure that we're complying with this law.

MR. KRUSE: Yes.

THE COURT: Make any, if there are changes that need to be made. I mean, there's a -- from what you're quoting -- the bill amends the Texas Education Code to bar the establishment or maintenance of a "diversity, equity and inclusion office at any state institution of higher education." My recollection from the complaint is that in the call for relief, Paragraph 66, it's more directly (f) Appoint a court monitor to oversee the Diversity Office at Texas A&M University to ensure there's no aiding or abetting of violations of civil rights laws. And so there's those overlap. Right?

MR. KRUSE: Right, right.

THE COURT: So is there a DEI office at Texas A&M right now?

MR. KRUSE: Well, there's an Office of Diversity.

THE COURT: Okay.

MR. KRUSE: And that will be, that will be reviewed and evaluated in light of the statue.

THE COURT: And it might go away.

MR. KRUSE: Correct.

THE COURT: But it might not.

MR. KRUSE: Correct.

THE COURT: But that's going to be reviewed?

MR. KRUSE: That will be reviewed. That will be reviewed. And in our response, which is, which is really quoting some of the language of the prayer where they

specifically says they want, you know, to enjoin the use of those preferences --

THE COURT: Again, I'm not expressing a view on what Texas A&M must or should do or that if it's got an office, that's a good thing or a bad thing presently or how it interacts with the law. I'm just saying a law was just passed. It's about to be signed. It seems to overlap with some of the contentions in this case. So I would assume that A&M is going to be reviewing and then we'll have sort of a new state of affairs.

MR. KRUSE: That's correct, Your Honor.

THE COURT: Okay, all right. Okay. Go ahead.

MR. KRUSE: You know that goes directly, I think, to that Greenstein case on ripeness where the Fifth Circuit said, wait a minute, you know, you have this, antiabortion, or this abortion law in the State of Louisiana. And they rushed in to try to challenge that law and the Fifth Circuit took a look at it and said, wait a minute. You know the statute's not, hasn't been enforced. It was newly filed. Why don't we wait and why don't we dismiss on the grounds of ripeness? And I think that's appropriate here. That's appropriate with this particular new statute coming in. Let's see how it goes. And they could come, you know, file another lawsuit if they think there's a problem on that. But I think it fits in directly with what the Fifth Circuit decided to do in that Greenstein

case related to the abortion statute in Louisiana.

THE COURT: Okay.

MR. KRUSE: And that's what we're asking for on the, you know, on the -- now, I will say Your Honor on the standing issues here and we have -- just to be clear -- you know we have made a factual challenge and a 12(b)(1) --

THE COURT: And you're entitled to do that under 12(b)(1).

MR. KRUSE: Yes, sir. And it puts the burden on the plaintiff. The burden on the plaintiff is the plaintiff has to come forward with the evidence. You know we've come forward with evidence too, which we're entitled to do.

THE COURT: Right.

MR. KRUSE: The plaintiff has filed a declaration. Well, let me tell you, the plaintiff has filed a five-page declaration and that's, that's basically all. And let me tell you, you know, it's mainly about his criticism of the University of Texas, rightly so.

THE COURT: Mr. Mitchell, there's a lot of people in the audience. Is your client here today?

MR. MITCHELL: He is, Your Honor.

THE COURT: He is? I suspected that he might be. So if you want to introduce him, just so --

MR. MITCHELL: That's my client, Professor Lowery.

THE COURT: All right, welcome, Mr. Lowery. There's

more people in the courtroom than usual, but I was thinking that he might be with you. You could have had him at table with you, if you'd like.

MR. MITCHELL: I didn't know that was allowed.

THE COURT: Yeah, that would is your client. Mr. Lowery, you're certainly welcome at table with your counsel if you'd like to be in front of the bar, that's fine with me.

MR. LOWERY: Thank you.

THE COURT: He is a client. He is a party to this case. So it's fine to have him at the table with you.

MR. MITCHELL: All right, thank you.

THE COURT: Okay. Go ahead, Mr. Kruse.

MR. KRUSE: Well, what I was saying is that, you first --

THE COURT: Anybody from A&M here that you would like to have? You're also welcome.

MR. KRUSE: They're good to sit back there.

MS. VOGEL: Thank you so much.

THE COURT: Welcome to Texas A&M University as well.

MS. VOGEL: Thank you.

THE COURT: Thank you. You are?

MS. VOGEL: Carla Vogel, Assistant General Counsel.

THE COURT: Okay.

MS. VOGEL: And Kathleen Colt, Assistant General Counsel.

THE COURT: All right. Thank you both very much for being here. Go ahead, Mr. Kruse.

MR. KRUSE: Okay. We were talking about what did -- the plaintiff has the burden, what did the plaintiff file to get the evidence in front of the Court? You have a five-page affidavit. It's mainly about the University of Texas. You know, it says in there -- it doesn't say he's quitting his job at the UT. But he says, you know, I think there's a phrase in there that would indicate that he doesn't intend to stay at UT forever. Well, okay, so he may stay there a while, I would say where you interpret that. But what's not in that complaint or in that declaration is it, what's he looking for? You know, the Supreme Court in Carney got upset with the plaintiff because they were --

THE COURT: It's looking for what he articulates as a level playing field and pointing to policies that he has concerns about. So, I mean, I at least understand that. I don't know if it's enough, but I at least understand that. He has articulated some changes that he wants.

MR. KRUSE: Well, he's --

THE COURT: The question is whether he gets to be the one to say, in this action and these ways, I can force these changes.

MR. KRUSE: He can act as a policymaker and make an advocate for changes in Texas A&M and he's been an advocate in

the legislature and done a good job with that. But to get standing, the concrete harm, the injury to that individual, that doesn't get you there. And why, Your Honor? You know, it's the same thing in Carney where he had all the good heart to try to change the law, this lawyer -- and I think they say he's qualified to be a judge. I shouldn't say it doesn't take much to be a judge -- but it does bring the Supreme Court opinion. I got that feeling.

THE COURT: Well you're talking about state court judge.

MR. KRUSE: Exactly, Your Honor.

THE COURT: Exactly.

MR. KRUSE: Exactly, Your Honor.

THE COURT: All right. Our Texas judges are great. Go ahead.

MR. KRUSE: I understand. I agree. I agree. He couldn't articulate what judicial position he was really going for. And in his affidavit or declaration to this Court, it's the same problem. There's nothing in there about, oh, I want to go for this open position at Texas A&M. This is what I want. This is what I've articulated to identify and he hasn't done that. He's in the same boat as Mr. Adams was in the Carney decision because he's not articulated anything about his job that he really wants other than, you know, other than make some general statement that he's not applying because he fears

discriminatory practices period. That's it. You know, you would think that if you really want a job at A&M in the College of Business or in the business school, you would articulate what you wanted and he doesn't do that. And that, I think, I think that, that alone, frankly, Your Honor, I believe is fatal to his standing arguments that he's making in this case.

THE COURT: The position that he's potentially interested in. I don't know if everybody's on the same page, but is it in the finance department at the Mays School of Business? Is that what it is?

MR. KRUSE: Well, yes, sir. I would think that that's generally what it, what it falls under. Okay? You know, he's a tenured professor --

THE COURT: From the briefing, it indicates that a lot of the policies -- that's the question that I have, that the policies -- is that the ACE Plus and ACE Fellows Program isn't involved at the Mays Business School?

MR. KRUSE: Yes, sir. Yes, sir. Each one of the schools has the option to participate in this program or not. The business school has never participated in the program. So that doesn't come into play. And that's what -- one of the big points that we make is that he -- I think when he brought this lawsuit, even though it's, I think, evident from our website, he was focused on that memo that he found or got a copy of. And then he realized that practice didn't apply to the College

of Business where he wants to get a job. And so that, I think, again, is fatal to his standing argument because it doesn't match up. I will say this too and point out that this memo on the ACE program did come out in July last summer and frankly, no one's ever hired, been hired under it. And we issued -- and Texas A&M issued a clarifying memo in December. We sent it to the plaintiff in this case and said, look, this is the operative memo on the program. It clearly says you comply with equal opportunity laws. There's no, you know, preference, you know, for underrepresented minorities. You know, we wanted to make it absolutely clear that we're not giving preferences to, for racial minorities. And that's what we did in that memo. And that, of course, was never used in the amended complaint or even talked about in a response to the motion to dismiss. That's important.

And then if the other exhibit and I -- and let me say this, Your Honor, since this Court is very familiar with all the whole Twombly Iqbal issue.

THE COURT: Yeah.

MR. KRUSE: When you read the complaint, it is filled with conclusory allegations and they, you know, it doesn't meet Twombly Iqbal, but then they try to, you know how you try to backfill it by saying I'll attach two exhibits to try to give little facts here?

THE COURT: Yeah.

MR. KRUSE: And the two exhibits, they don't get them there. That's what we said.

THE COURT: But that's moving to 12(b)(6), Iqbal Twombly, which I'm not really doing here today.

MR. KRUSE: Well, it's only relevance here is for standing, I would argue, just to make my observation here.

THE COURT: I see what argument you're making about the standing part of it. And it still can't be conclusory. It still can't be speculative.

MR. KRUSE: And no harm, no actual imminent harm. If there's no actual or imminent harm from a, from a, from a program that would cause him to say, I don't, I can't even afford to apply or can't even risk applying here. That's the problem. We wanted to point out for standing purposes that he has no risk. And he has -- he should have applied in order to get him in the door and start the process with respect to standing in this particular case.

THE COURT: All right.

MR. KRUSE: Now, I would point out --

THE COURT: I'll give you a couple more minutes to sort of wrap up on the standing, ripeness, mootness things. But then I want to start talking with Mr. Mitchell about it.

MR. KRUSE: Okay. Okay. You know, the chief case is that he's -- even that Northeastern Florida case versus Jacksonville, Your Honor, the court used the phrase, you know,

that's regularly bid. You know, they were saying, oh, we just want to get our foot in the door. We just want to have a level playing field to be considered. The Supreme Court went through the analysis and said, well, these plaintiffs, these contractors regularly bid and that's language that's been picked up by the courts too, regularly bid. They regularly bid on contracts and they would bid on this one except for that ordinance that the city had passed. And they, and the court said that's good enough for standing because they were, they were really in the game here of a municipal contractor.

And he cites Gratz v. Bollinger. You know that was a student admission case out of Michigan where it was clear that the plaintiffs there did actually apply to Michigan and were rejected. So there's no question about a lack of evidence with respect to applications there.

We've talked about the Teamsters case and we talked about their case on Carney v. Adams, which I do not think helps them at all in light of the facts on that particular case where, where the record is clear that he has a problem on applying, he has a problem on telling the court exactly what he was applying, applying for.

You know, this is standing argument, Your Honor, and I'll wrap it up here since I've already talked about, about ripeness here. There's a practical trial lawyer problem on this standing argument. You know, one is that we've mentioned

before that if you lower the standards here, you got a lot of Title VII people or a lot of, you know, discrimination people say, Well, great, I can get into court now with a lower standard here because I don't really have to apply. That's a problem. But secondly, Your Honor -- and I think the Court has looked at the prayer in this particular case, he at best -- and I don't think he does -- has standing on applying for a job in the College of Business. And yet his demand for injunctive relief in this case goes to the fact that he's asking this Court to be, in essence the HR Czar for Texas A&M and approve all appointments and preclear appointments, preclear compensation.

THE COURT: I'm aware of that request.

MR. KRUSE: That, to me, is a standing issue and yet we're allowing, that's why we cannot allow, you know, and someone in Mr. Lowery's situation -- and I do, you know, I have no doubt about his sincerity and about his sincerity with respect to what he is advocating for here, but that doesn't get you in the door.

It's better, I think, to be concerned about what Justice Alito said in the Clapper opinion where they denied standing about -- you're talking about separation of powers. You're talking about a political system that judges are not supposed to give advisory opinions. Judges are not supposed to just allow, you know, political decisions or policy decisions

to be made in their court. And the reason how we rein them in is standing. You've got to have standing to get into court. Thank you.

THE COURT: Thank you. I also take that last argument as you're not submitting your application to be considered as court monitor if it gets to that point.

MR. KRUSE: That's right. That's right.

THE COURT: All right. Thank you. All right. Mr. Mitchell.

MR. MITCHELL: Thank you, Your Honor. May it please the Court, there are three crucially important issues that should be clarified with respect to the defendant's motion. The first is one Your Honor has already discussed with Mr. Kruse, which is the distinction between standing and mootness. The post-fling events that the defendants rely on, not only the recent passage of Senate Bill 17, but also their decision to walk back in part the ACE's Plus memo of July 8th of last year go to the question of mootness because all of those events postdate the filing of this complaint.

The reason this is important is because of the burden of proof. With respect to Article III standing, the burden is on us to allege the elements in our complaint and ultimately to prove each of those elements by a preponderance of evidence after discovery and after fact development.

With mootness, the burden is on the defendants. They

have to prove mootness factually. And also if it's an act of voluntary cessation, they need to prove that it is absolutely clear the expected conduct would not be expected to reoccur.

THE COURT: Have you considered in light of, I guess, the amendment to the memo that you referred to and the new statute that's just been, I guess, it's about to be signed? Have you considered declaring victory and saying that action like this is forced change and your watchful eye will be on A&M and you'll bring another action if, if need be? But I'm sort of, I'm looking at just briefly what I see as the thrust of the law that's just passed. It seems to get a long way to where you're arguing as a policy matter on what education policy ought to be in the state.

MR. MITCHELL: Yeah, you're right, Your Honor. It does touch on that. I mean it certainly does with respect to faculty hiring. It specifically says in the bill that there's to be no consideration of race or sex, which is exactly what we're suing over.

THE COURT: Right.

MR. MITCHELL: The reason we're not ready to declare victory yet is because it is a factual question whether and to what extent A&M will comply with this. I can tell Your Honor from my own personal experience, I have served on university faculties where they have written explicit policies that say there is no consideration of race in faculty hiring and they

disregard those policies all the time and use race regardless. We could submit declarations from people who still sit on those faculties saying that very thing.

There is, in our view, a factual question on which A&M bears the burden of proof, not us, where A&M would need to show that number one, they are complying with the law as written. But number two, provide some assurance that can prove to the Court -- because again, the burden of proof is on them -- that they are indeed complying and that it's not going to be a situation where the university is saying one thing and doing another.

THE COURT: Let me ask this to both of you, also to Mr. Kruse on behalf of the university. I've got the notice, notice of supplemental authority and I've got your response. Is that adequate briefing on a potential mootness issue or should I just get, you know, a further affirmative motion or explanation in that regard and you have the chance to respond to it. Mr. Kruse. I mean, I can read it myself and I do have your notice, but as a notice you did it write, it's less argumentative as opposed to simply saying, hey, here's this other thing that you need to read.

MR. KRUSE: Your Honor, since I guess I normally would have a reply right to what Mr. Mitchell has filed, but, you know, if -- you know, I'd be more than happy to file a -- you know, next week we could file something with the Court on

if you want on mootness specifically.

THE COURT: Well, let me ask then, Mr. Mitchell, is your response, is it enough? Well, I just want to do -- do I have your views on mootness in writing?

MR. MITCHELL: It's somewhat skeletal. I think I could develop the arguments a little more if I had had a little more time to respond. We were, we were rushed to get that in.

THE COURT: From yesterday to today.

MR. MITCHELL: I think the only thing I would add to elaborate on the points that we made is -- and we gestured toward this in the written submission -- there is a need, in our view, for factual development because mootness is a question on which they bear the burden of proof. And in our view, simply citing the existence of Senate Bill 17 is not enough to prove factually by a preponderance of the evidence that they're going to comply. So we would like to take discovery on the mootness questions.

THE COURT: I'll come back around to further, whether there's going to be further writing on mootness later in the hearing.

MR. MITCHELL: All right. The second distinction, Your Honor, I mentioned three at the outset. First is this distinction between standing and mootness. The second though is the fact that we are at the motion to dismiss stage of the litigation and we're not at final judgment or summary judgment

yet. And this is where Carney against Adams comes in. Carney was a case where the Supreme Court was reviewing an appeal from a final judgment of the District Court where the plaintiff in Carney needed to prove by a preponderance of the evidence that he stood able and ready to apply. We're not anywhere near that stage of litigation yet. We're at the complaint stage, the motion to dismiss stage, where we need only to allege that Mr. Lowery stands able and ready to apply. Now, we've done more than that by attaching a declaration, a sworn declaration which we don't think we needed to do. We did that out of an abundance of caution. But in doing that, I don't want to in any way concede that it's our obligation at this point of a litigation to prove standing.

THE COURT: Okay.

MR. MITCHELL: We need only to allege it. And all the points that Mr. Cruz is making about Carney have to be understood in the context of a case where the plaintiff had to prove the elements of standing, not simply allege them. We eventually will have to prove standing. I'm not denying that we'll have to do it. We just don't have to do it now. That will come later after discovery. And after fact development.

THE COURT: And what's the third point?

MR. MITCHELL: The third point, which is closely related to the second, is the distinction between a facial and factual 12(b)(1) motion. And the defendants -- I'm not in any

way suggesting bad faith on their part -- but they haven't been entirely clear the extent to which their 12(b)(1) motion is facial and the extent to which it is factual. So in a, in a facial 12(b)(1), they are challenging the adequacy of, of our allegations of standing. In a factual 12(b)(1), they would be challenging the truth of our allegations.

If Your Honor looks at Pages 6 through 8 of their original motion --

THE COURT: I mean, they're definitely bringing a factual standing challenge at this point.

MR. MITCHELL: With respect to Mr. Lowery's intentions of applying.

THE COURT: Right.

MR. MITCHELL: So the way I construe their motion -- and Mr. Kruse should correct me if I'm wrong -- I think they are bringing a partial factual challenge, but only with respect to Mr. Lowery's intent and state of mind and whether he's able and ready to apply.

If you look at the rest of their motion, they're challenging the adequacy of our allegations with respect to the alleged discriminatory practices. They haven't said, at least the way I interpret their motion, they're not denying factually that there is race and sex preferences going on.

THE COURT: So in that context, a facial standing challenge would be really no one would be able to have standing

based on our policies as construed?

MR. MITCHELL: Or they would -- I'm sorry.

THE COURT: And then factual challenges, okay, even if somebody has the ability to do it. Mr. Lowery, factually, can't do it because is able and ready is not able and ready enough. Is that the distinction that you're saying?

MR. MITCHELL: Basically right. The only thing I would add, Your Honor, is I think you could also make a facial challenge by just saying we didn't plead enough detail under Twombly or Iqbal. That's another way, I think, of bringing a facial 12(b)(1) in the context of Article III standing.

So we've tried to respond to this, what we view as almost a hybrid motion, where we put in that declaration for Mr. Lowery to try to produce some evidence that Mr. Lowery is telling the truth in the allegations of his complaint. At the same time, we don't need to prove all the elements of Article III standing. We don't need to show, for example, that it's factually true that the university is discriminating because we haven't had a chance to take discovery yet. It's not reasonable to put us to that burden at this point in the litigation.

So there's some statements in the reply brief from the defendants that say we need to prove everything about standing by a preponderance of the evidence now because they've thrown down the gauntlet with a factual 12(b)(1) motion. We

respectfully disagree. We can't, at this point, prove all the elements of standing before we've had a chance to take discovery. We could, I think, prove Mr. Lowery's intentions because Mr. Lowry has that information himself and he's produced that in the declaration. But when we haven't yet had a chance for discovery, it's not reasonable for the defendants to say that we need to go all the way and prove right now at the outset of the proceedings in this case, prove by a preponderance of the evidence, all the elements of Article III standing. That has to wait for discovery so we can find out exactly what's going on at A&M before we can prove that part of the standing inquiry.

So I hope that makes sense, Your Honor.

THE COURT: It does, it does.

MR. MITCHELL: Yeah, that's, that's how we're approaching their motion.

THE COURT: Okay.

MR. MITCHELL: And again, Mr. Kruse should, should correct me if I'm mischaracterizing their argument in any way. So I'm happy to answer any other questions Your Honor may have. I think the only other point I would emphasize is that it's very clear to us from the case law that Mr. Lowery does not need to formally apply. That is clear from Carney, all you need is --

THE COURT: It's clear from the case law what?

MR. MITCHELL: That Mr. Lowery does not need to formally apply to A&M before he can have standing because Carney against Adams says you only need to stand able and ready to apply. Gratz against Bollinger is really helpful to us where Patrick Hamacher, who was given standing to sue Michigan as a transfer student, never applied as a transfer student. And the Supreme Court said that's okay. He only needs to be able and ready to apply. Now, Hamacher did apply to Michigan initially as an undergrad, but that didn't go to whether he had prospective relief to sue Michigan over its transfer admissions policies.

And then there's a really helpful quote from City of Jacksonville, this case a Northeast Florida Chapter, where the court says -- this is on a 508 US at Page 666 -- "To establish standing, a party challenging a set-aside program like Jacksonville's, need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." And that's exactly what we're alleging here. We allege Mr. Lowery is able and ready to apply even though he hasn't applied yet. But there's a discriminatory policy that prevents him from seeking employment on an equal basis with others. And that's all we need, again, at this point of litigation.

THE COURT: Let me ask a couple of questions. There was an assertion and I just like your thought on, Has the

plaintiff, can the plaintiff identify any actual victim of the discriminatory policy that you're asserting? Is there anybody that you could point to that that's the person who didn't get hired that should have?

MR. MITCHELL: No. And the reason for that, Your Honor, is we're not necessarily seeking prospective relief -- I'm sorry, retrospective relief on behalf of any other non-party to this case. So Mr. Lowery is suing on behalf of himself and a class of others who will apply in the future.

THE COURT: Right.

MR. MITCHELL: So it's forward looking. We're not trying to seek damages on a class-wide basis. We might try to get nominal damages perhaps for Mr. Lowery. But we're not --

THE COURT: I terms of showing that there's a problem here or that there's a well-founded fear or whatever, I just want to be clear that there's not anybody -- I'm not aware of any, I'm not aware -- there's not anybody that you're pointing to that it was X, Y, or Z person got turned down and has been complaining that they got turned down because of affirmative action programs.

MR. MITCHELL: We haven't alleged that yet.

THE COURT: Okay.

MR. MITCHELL: Perhaps after we take discovery, we will find such a person.

THE COURT: All right.

MR. MITCHELL: What we have alleged is that there's a pervasive practice at A&M of race and sex preferences and faculty hiring of which the ACE's Plus program is simply one manifestation. But we will need to obviously do more than just have bare allegations to survive a motion for summary judgment. And if discovery turns out that there hasn't been anyone who's been denied employment, that will make it much harder for us to prevail on a motion for summary judgment. But that's all going to come later in our view. Discovery has to happen first before we can be expected to produce that type of evidence.

THE COURT: All right. And then on, was it the University of Florida where he has or did apply?

MR. MITCHELL: Yes.

THE COURT: University of Florida. When he applied, was there on their website policies that said, Hey, we have a DEI program that's in place? Was that known at the time that he applied?

MR. MITCHELL: There were things on websites about DEI. There was nothing, I think, that explicitly said we give discriminatory racial preferences or sex preferences in our faculty hiring. Maybe you can imply that from having a DEI page, perhaps. But generally, these types of websites use bromides and platitudes to describe what they're actually doing?

THE COURT: Yes. Okay. All right. And let's look

at Carney. The court goes into -- and is it a Justice Breyer opinion? Is that right?

MR. MITCHELL: It is, yes.

THE COURT: How long is it? Maybe I'm remembering the wrong case?

MR. MITCHELL: It's not that long. I mean for Justice Breyer opinion --

THE COURT: It's four or five pages?

MR. MITCHELL: Yeah.

THE COURT: I mean, it's pretty short, right?

MR. MITCHELL: I think it might have been ten or so.

MR. KRUSE: I withdraw my criticism of --

THE COURT: No, no, no. I generally agree with that. I think everybody would generally agree with observation. It's 2020 decision.

MR. MITCHELL: Yeah.

THE COURT: Okay.

MR. MITCHELL: And it is short, partly, because they didn't get past Article III standing. So they didn't have to go into the merits, which is what they granted certiorari on.

THE COURT: All right. And so there's sort of a block quote where it's not set out as a Breyer multifactorial test, although he often does. But his words, I would apply standalone without any actual past injury, without reference to an anticipated time frame, without prior judgeship applications

without prior relevant conversations, without efforts to determine likely openings, without other preparations or investigations, and without any other supporting evidence. And we could go through each one of those. I mean I see some of the things that you're submitting that having read that and trying to tailor into what's being said there, is that right?

MR. MITCHELL: Right.

THE COURT: Like what you've submitted is what you've got that responds to those concerns in that case?

MR. MITCHELL: Yes, partly. Now, again, this was on review of final judgment.

THE COURT: I got that.

MR. MITCHELL: So that's the key point I want to make. We will eventually have to prove those sorts of things. We just don't have to do it now.

THE COURT: Okay.

MR. MITCHELL: But Your Honor is correct. That is one factor to consider. Now, there's also Justice Breyer says -- and I'm looking at this passage right now -- three considerations taken together convince us. So it is one of these, that's one factor of a three-factor test. So we'll probably have additional briefing on just exactly how all these factors work together. But we definitely acknowledge, Your Honor, that it is our burden to prove this factually. And we will eventually have to prove something along the lines of what

Justice Breyer is describing. But at this stage of the litigation, it's enough for us to allege. And that's what we've done. And that's enough to defeat at least a facial motion to dismiss.

And factually, we still should have the chance to get to discovery if they do want to contest the truth of our allegations. That should happen after discovery and fact development before this Court decides definitively whether we've done enough to show factually whether we have proven our case.

THE COURT: This isn't casting an aspersion on your case. This is a policy-directed case. I get that. And if you have standing to do it, then you get to do it. But is there, with what's going on in the statute and with everything that's going on, has there been discussions, is there anything that you all want to talk about about whether something potentially satisfactory might occur based on the statute that's just come out that, I mean, as the federal judge, I'll rule on what I need to and I'm always content to not rule if I don't need to.

So, is there any, I mean do you just want a ruling on this because that's what you want or is there a context within which you all could talk and maybe it alleviates the dispute. I would never terminate the dispute because you'd always be able to bring a later one. But we have the statute, how it might be applied. Have you given thought to that?

MR. MITCHELL: I haven't given thought to it yet just because SB 17 is such a recent development. But I think there's certainly potential for us to discuss whether SB 17, if there is going to be compliance with the statute in a way that could satisfy us, could obviate the need for the Court's intervention. Courts exist to resolve cases or controversies.

THE COURT: Exactly.

MR. MITCHELL: And if there's no more case or controversy because the university is doing what we want, there's no need for the Court to be involved. We acknowledge that and we have no desire to waste the Court's time or seek an advisory opinion or misuse the --

THE COURT: Right. And it's not wasting my time. I'm just sort of like -- I always give parties a chance to talk it. You heard my initial conferences on a slip and fall case. It's like, Hey, when are you all going to go talk about this because maybe it will go away? And I'm happy for that to happen. But this is a different type of case, obviously.

MR. MITCHELL: Right. And SB 17 certainly changes the playing field. We acknowledge that.

THE COURT: All right. Would you all -- I would ask, is there anything else you wanted to address with me?

MR. MITCHELL: Unless Your Honor has further questions, no.

THE COURT: Those cover the questions I had. Mr.

Kruse, I'll hear anything further that you want to say in response. I would like 10 days to give me a status report on whether there's the potential for discussions on which I should then hold off on ruling here.

And in that status report in 10 days, let me know if you want to brief anything further on the new law as to mootness or however it might impact what's already teed up in front of me because I don't want to go through sort of threshold issues on this and then have another threshold issue more formally briefed as mootness. I'd like to sort of look at clearing out whether and what's going forward in this action substantively, if there are other standing or Article III variants, that sort of terminate what I would be doing at this point. Does that make sense?

MR. MITCHELL: Yeah.

MR. KRUSE: We'll report back in ten days, Your Honor.

THE COURT: All right. Thanks. Sort of the one other non-12(b)(6) issue was the sovereign immunity. I think I've got it on the briefing from both parties, but I am looking at that right now as well. Do you want to give me, I'll let Mr. Mitchell lead on that and then you can respond further on that. How about maybe like five minutes from each side on sovereign immunity.

MR. MITCHELL: We address that, I think, fairly

thoroughly in our brief and as did our opposing counsel. And, Your Honor, we just see all the time whenever a litigant sues over a university policy, it seeks prospective relief, you sue the university president. That's just the normal ex parte Young defendant. This is not a situation where we're challenging the enforceability of a statute. So a lot of these cases that the defendants are citing are brought up in that context. We're challenging an ongoing policy that we allege is, is pervasive throughout the university. And ultimately, the president is responsible for it. And if we're not going to sue the president, who are we supposed to sue? And that's the rhetorical question that I would ask the defendants.

THE COURT: Right.

MR. MITCHELL: There's, there needs to be somebody. This is not a Texas Heartbeat Act situation where it's designed to have no ex parte Young defendant.

THE COURT: Also in part, the argument is, okay, if we haven't sued the right university official, just tell us who it is and we'll sue that person.

MR. MITCHELL: Right. That's kind of what I would ask. I mean, obviously, it's our job to figure out who to sue because we're the plaintiffs. But this doesn't seem to me a situation where it's been designed intentionally to have nobody responsible for the ultimate policy at the university.

THE COURT: Right. Somebody has to be responsible.

MR. MITCHELL: Somebody has -- and when we talk about faculty hiring, the provost signs off on every decision, the president signs off on every decision, or at least on most of them. And if it's not the president, it's one of the president's delegates who the president would be responsible for.

THE COURT: All right. Okay. Thank you very much.

MR. MITCHELL: Thank you.

THE COURT: Mr. Kruse.

MR. KRUSE: I'll make a couple of comments on this sovereign. I'm trying to get an ex parte Young case. I was intrigued by there was no response to our latest cases. You know, last year, the Fifth Circuit in that Texas Alliance v. Scott case, you know, held that the Secretary of State had no ex parte Young, you know, argument and they dropped her or dropped him out of the case and dropped the case. And I would direct the court's attention, frankly, I don't refer many times to a dissent, but Judge Higginbotham had wrote a dissent in that case giving the history of how ex parte Young has been narrowed and continues to be narrow. And that's what we're talking about here because I don't think they've adequately alleged those four particular people. You know, you could say, oh, yeah, it's the president, you know, a general duty to enforce the rule. It doesn't get you there under the cases that we cite and I think the courts have been backing off on ex

parte Young and that's the cases we'd like for this Court to read and, frankly, this diversity statute comes into play. We now, you know, you're not going to just say, oh, we'll just name the heads of the diversity office. Well, we don't have a diversity office. So that's the type of easy, kind of, trial lawyers say we'll just name these people and we can get away with it. But I think the courts are taking a closer look at it.

THE COURT: But for ex parte Young, is it narrowing its availability or is it narrowing who can be sued under it?

MR. KRUSE: Well, it's narrowing --

THE COURT: What you're saying about Higginbotham's opinion.

MR. KRUSE: It's narrowing the availability of who can be sued on it because there they said the Secretary of State on voting laws in Texas was not going to be the proper ex parte Young. Now that was a --

THE COURT: And did they determine who it was?

MR. KRUSE: No.

THE COURT: They just determined that they didn't get this right.

MR. KRUSE: That person had, that this person was off. You know, and that case was interesting again. Now that is the law. They argued that this person, that Secretary of State, didn't necessarily -- this was the challenge with

respect to when Texas passed a law that said -- got rid of straight party ticket voting.

THE COURT: Okay.

MR. MITCHELL: Some people didn't like it, right? And so there's a lawsuit brought about who do you sue? You know, you can't sue the state. So they sued the Secretary of State who generally everybody concedes, and at least Judge Higginbotham thought, was the person that you would sue in the State of Texas who handles voting. Court said, no. The court said there's a lot of local officials who are going to enforce that law and; therefore, you know, they were, they were going too high. Let's put it that way.

THE COURT: And so, okay.

MR. KRUSE: And so, and so, it's similar to what you get into this, this kind of a, what I call a kind of a knee jerk reaction, oh, let's just sue the president.

THE COURT: But I can sort of see that in terms of if you're looking at sovereign entities that range from municipal to state level as to who you're picking that are enforcing these things. I don't pretend to understand all the arcana of Texas law and procedure. But is that, does that overlay onto like a university system the same way? Because I mean, there is only one person at the top of the chain there. And from what I hear you saying, the Secretary of State is not necessarily the person that's on top of what's going to happen

in Harris County or Bear County or wherever. There's an election administrator for each of those counties. What, what's your thought?

MR. KRUSE: Part of the problem with this case is that, you know, how do you determine on a program they say there is a -- you know, if they say there's a systematic discriminatory policy at Texas A&M, people have denied that and people will say there is none. You know, we've made that argument. There is no policy here to discriminate and have preferences for racial minorities. And so the issue is no, you know, there's somebody out there who we should target for an injunction. It's kind of hard to do, Your Honor, because the, the president will say that's not -- you know, I don't have to enforce the law generally. That's what the case says, to enforce the law generally is, you know, maybe the president's duty, but that doesn't get you into ex parte Young.

THE COURT: Okay.

MR. KRUSE: And so that's the concern I've got here and I would direct your attention to the cases that we cited in that portion of the brief.

THE COURT: All right. Thank you. All right. Thank you all very much. If there's nothing else, that will conclude us today. For what it's worth, I will note that you all brought out a lot of Fifth Circuit law clerks and other summer interns who are here in the building. So it was a good

argument. Mr. Kruse, the last time we were in a courtroom together was across the hall before Judge Lake if you remember. I was a young partner supporting Steve Sussman. I think you all battled to a draw that day and it settled. But I say that in memory of Mr. Sussman.

MR. KRUSE: Yes. Thank you. Thank you. Steve is a good man to remember.

THE COURT: We are adjourned.

(Hearing adjourned at 11:51 a.m.)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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